IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1312

DONOHOE CONSTRUCTION CO., INC., *Petitioner*

v.

MONTGOMERY COUNTY COUNCIL, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit on behalf of respondents Montgomery County, Montgomery County Council, The Maryland-National Capital Park and Planning Commission, and Montgomery County Planning Board is not yet officially reported (Pet. App. 1a-15a). The opinion of the United States District Court for the District of Maryland is not reported (Pet. App. 16a-31a).

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment provides in pertinent part: ". . . nor shall any State deprive any person of . . . property, without due process of law . . . ."

QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law in its inability to construct an office tower because of a sewer moratorium imposed by a governmental body not party to this litigation.

2. Whether petitioner, by commencing this litigation approximately six months after the County published plans to purchase petitioner's property, had been so damaged by the time lapse as to be denied due process of law.

STATEMENT

Petitioner's Statement of Facts is virtually identical to its Statement in its Brief to the Court of Appeals. It begins, again, with a "Summary" Statement with no reference to the record, permitting inferences to be subtly and early made where no facts exist. Because the distortion of certain salient facts by Petitioner is so shocking, some clarifications must be made.

1. Petitioner states that subsequent to its "assembly of Parcel One," public hearings began on the Preliminary Sector Plan for Friendship Heights, Maryland, which "recommended downzoning Parcel One from C-2 to CBD-1" and "permitting development of only 14,500 square feet" (Pet. 5; true figure is 15,500 square feet, as stated at Pet. 10). First, Parcel One was never assembled as a lot on a subdivision plat for recording and possible subsequent development by Petitioner. Parcel One is comprised instead of three lots — one for each of two houses and one for Saratoga Avenue abandoned. Indeed, Saratoga Avenue abandoned has never been platted. (App. 1219). Secondly, Parcel One was never singled out for proposed downzoning, which is an inference running as a thread throughout Petitioner's Statement. Most of the land in Friendship Heights was likewise zoned C-2 and was likewise recommended for CBD-1 zoning by the Sector Plan. (App. 1243 at p. 48-49). Finally, all three lots of Parcel One together comprise only 15,246 square feet. (App. 1243 at p. 44).

2. Petitioner, citing to nothing in the record, states that "the Commission and County employed administrative procedures in the building permit application process to delay review of Donohoe's plans and hinder issuance of a building permit." (Pet. 6). Nothing could be further from the truth. Petitioner applied for a permit from the County on March 19, 1973. (App. 1235; Stip. 103). The application was forwarded to various agencies, including the Park and Planning Commission[1] and the Washington

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[1]The Maryland-National Capital Park and Planning Commission and Montgomery County Planning Board, one of its two constituent bodies, was created by Chapter 448 of the Laws of Maryland of 1927; its enabling authority is found in Article 66D of the Annotated Code of Maryland, 1977 Cumulative Supplement. It is an independent instrument of the State, not an agency of either Montgomery or Prince George's County nor a part of any other bi-county regional commission, charged with planning, parks and subdivision functions within most of Montgomery and Prince George's Counties. *Prince George's County v. M-NCPPC*, 269 Md. 202, 306 A.2d 223 (1973); *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 96 A.2d 353 (1953).

Suburban Sanitary Commission (WSSC)[2]. (App. 1236; Stip. 104). On March 21, the Commission advised the County that, with three lots underlying the proposed building, resubdivision would be required to create one lot. (App. 1236, 796; Stip. 106). The County so advised Petitioner on March 27. (App. 1237, 797; Stip. 107). On April 13, Petitioner applied to the Commission for resubdivision, and the application was forwarded appropriately to various agencies. (App. 1228; Stip 54, 55). On May 24 and 31, the WSSC responded to the application, stating that no sewer capacity was available for the fourteen-story building proposed, and further, that it (WSSC) had imposed a sewer moratorium on the Little Falls drainage basin, which included the subject property. (App. 1228, 806; Stip 59). Petitioner *did not appeal* the WSSC decision. (App. 356). Thus, by May, the WSSC was solely in control of the application, and neither Commission subdivision approval nor County building permit approval could legally issue once the WSSC made its independent negative determination. (App. 274, 352-356, 391, 408). As the Court of Appeals stated, this sewer impediment was clearly beyond the control of all the parties to this litigation (Pet. App. 11a), given the exclusive sewer responsibility residing in the WSSC, an autonomous state agency. *Board of Appeals of Montgomery County v. Marina Apartments, Inc.*, 272 Md. 691, 326 A.2d 734 (1974); Chapter 115 of the Laws of Maryland, 1971, as amended.

3. Petitioner claims, again citing to nothing in the record, that "Informed of Donohoe's pending building permit, the Board

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[2]The WSSC was created by Chapter 122 of the Laws of Maryland of 1918. An independent public body corporate created by the State, it exercises the public water and sewer authority within Montgomery and Prince George's Counties, and has its own authority to sue or be sued, to exercise the power of eminent domain, and to derive its own funds from separate sources. It is not an agency or part of either County or of the Park and Planning Commission. *Board of Appeals of Montgomery County v. Marina Apartments*, 272 Md. 691, 326 A.2d 734 (1974); *Bowie v. WSSC*, 249 Md. 611, 241 A.2d 396 (1968); *Neuenschwander v. WSSC*, 187 Md. 67, 48 A.2d 593 (1946).

ordered and received a professional appraisal of Parcel One . . . ." (Pet. 6). There is absolutely no evidence that Petitioner's building permit application to the County somehow caused the Commission's Planning Board to order an appraisal of Petitioner's property. The record does establish that the Board ordered an appraisal for *planning* purposes of *five* sites in Friendship Heights, not just Parcel One as implied at Pet. 13. (App. 1224, no. 33; App. 1225, no. 35).

4. Petitioner claims that "One day after the Board tentatively approved the Final Draft Sector Plan calling for public acquisition, it considered and rejected Donohoe's subdivision plan." (Pet. 6-7). Aside from the legal argument that the law dictated denial of the proposed subdivision given the lack of sewer availability by the WSSC for the proposed development and the severe traffic constraints, the Draft Plan forwarded by the Board to the County Council recommended not only public acquisition of Parcel One by the *local taxing village* but also *private development* in the alternative. (App. 168-69, 1378, 1380, 1384).

5. Petitioner claims that the comprehensive rezoning of Friendship Heights "had no practical effect on the parcels surrounding Parcel One," that "[a]mong its neighbors, only Parcel One was truly affected." (Pet. 8, 18). The entire Friendship Heights Central Business District comprises only 37.5 acres; on North Park Avenue alone, Parcels 4, 5, 6 and 7, as well as 1, were similarly undeveloped and similarly rezoned to the CBD-1 classification. (App. 1243 at 11, 42, 44, 48). The constant and unsupported implication by Petitioner of an intentional singling out of Parcel One defies everything in the record as well as the rationale for the Sector Plan and subsequent comprehensive rezoning of Friendship Heights, which were upheld by the Maryland Court of Appeals in *Montgomery County, et al. v. Woodward and Lothrop, Inc., et al.*, 376 A.2d 483 (1977).

6. Petitioner states that "As a consequence of [Parcel One's]

designation in the Sector Plan and C.I.P., it became impossible for Donohoe either to obtain mortgage financing for construction or to sell the property to other developers." (Pet. 8, 19). Nothing could be further from the facts. Richard Donohoe, president of Petitioner, testified that Donohoe never offered Parcel One for sale, never attempted to sell it, never attempted to mortgage it and was, in fact, generating rental income from the two properties comprising Parcel One. (App. 281-83). Indeed, Donohoe also testified that Petitioner bought Parcel One in two transactions at obviously C-2 zoning prices without knowing about or caring to investigate the already-released Preliminary Sector Plan, which proposed CBD-1 zoning for Parcel One and many other parcels (App. 279-80), even though Petitioner had been represented by counsel before the Planning Board and its Friendship Heights Citizens Advisory Committee prior to Petitioner's purchases of the Parcel One lots and prior to the Board's and Committee's promulgation of the Preliminary Plan. (App. 536-37, 954, 1220, 1223). The Constitution certainly does not obligate the government to underwrite such a speculative gamble taken by an "eyes-open" developer during a comprehensive planning process, particularly where that gamble includes the wearing of blinders to the WSSC and State-imposed sewer moratoria.

7. Petitioner explains that Parcel One "had existing sewer connections and service being utilized by the two single-family dwellings located thereon." (Pet. 8). It must be pointed out, however, that sewer *capacity* was *not* available under the terms of the existing moratoria, except to the extent of the existing flow (Parcel One was generating a sewage flow of 1,000 gallons per day, while the proposed office tower would generate a flow of 16,000 gallons per day). (App. 359, 760, 806).

8. Petitioner states that Parcel One is surrounded by large apartment buildings. (Pet. 8-9). Directly north of the parcel, however, lies public parkland and single-family residential homes. (App. 1243 at 42).

9. Petitioner states that "the Sanitary Commission [WSSC] reviewed the building permit application and deferred any action on Donohoe's request for sewer service." (Pet. 12). The word "deferred" is certainly the least accurate statement contained in WSSC's letter of May 31, 1973 to Petitioner, which letter stated tersely that the State moratorium of May 20, 1970 and WSSC moratorium #72-041 made it impossible to authorize sewage for Petitioner's projected flows until added *capacity* was gained through temporary or permanent treatment plants. (App. 1218). From May 31, 1973 until this suit was filed that WSSC determination remained unchanged. (App. 354). Moreover, the second State moratorium of August 16, 1973 further precluded authorization, and Petitioner never applied for or received an exception therefrom. (App. 861-65, 1237, 1241; Stip. 110, 138).

10. Petitioner asserts that "Finally, after repeated requests by Donohoe, the [County] Department [of Environmental Protection] processed Donohoe's permit application and by mid-November, 1973, Donohoe's plans were approved in all respects except air pollution licensing." (Pet. 15). This was hardly the case. On August 24, 1973, Donohoe's counsel wrote the County a letter acknowledging the County's administrative policy of not reviewing *structural* plans until WSSC sewage and Commission subdivision approvals had been obtained, further acknowledging that Donohoe lacked these approvals, but nonetheless requesting that the *structural* plans be reviewed while solutions to these problems were sought by Donohoe. (App. 868). The County granted this requested exception to its policy, reviewed the structural plans, and notified Donohoe's attorney of their near-approval on November 15. (App. 394-7, 885). Due to the continuing moratoria, Donohoe never solved the sewage and subdivision problems. And the County, which processed the structural plans out-of-turn at Donohoe's request, now stands accused of delaying and hindering, with the Commission, the processing of Donohoe's building permit! (Pet. 6).

11. Petitioner claims that "there ensued extensive discussion of the high cost of acquisition of Parcel One. (J. App. 992; 1016). Indeed, the Council had actually decided to further downzone Parcel One to R-60, a lower zoning category than CBD-1. (J. App. 1390)." (Pet. 17). Again, Petitioner through distortion of the truth seeks to create the impression of a major, calculated intent to bend a broad-based planning process to the parochial aim of blocking development of Parcel One under the C-2 zone. The record cited shows no "extensive discussion" on Parcel One but rather a brief, normal discussion as a part of many public worksessions on the Sector Plan, and the Council never decided at any time to rezone Parcel One to R-60, nor does that designation appear in *any* of the several drafts of the Sector Plan. (App. 580-83).

The tired litany of unsupported allegations and the blatant misrepresentations manifest in Petitioner's Statement of Facts typify the pattern of Petitioner's case from the start — to "bull it on through" the courts (App. 1194, in-house memorandum by Petitioner's president) by attempting to foster the belief that Petitioner was truly and constitutionally injured.

ARGUMENT

As the Court of Appeals stated, "the fundamental impediment to Donohoe's construction plans was (and still is) the sewer moratorium imposed upon the Friendship Heights area by the State of Maryland. This impediment was clearly beyond the control of any of the parties to this litigation." (Pet. App. 11a). Petitioner planned to build a fourteen-story building under the then-prevalent zone in Friendship Heights (C-2), was stymied by the WSSC and State-imposed sewer moratoria, and has since never sought waiver from the moratoria nor made any effort to analyze the potential fifty uses that could be made of the property under the current CBD-1 zone (prevalent throughout Friendship Heights). (App. 286). Petitioner never analyzed the feasibility of privately developing the property in accordance with CBD-1 zoning; indeed, Richard Donohoe testified that an office building would be marketable in Friendship Heights be it fourteen stories or one. (App. 283-84, 287). Thus no taking by Respondents could have occurred given the moratoria and the continual ability of Petitioner to conceivably develop its property had it wished, albeit not with a fourteen-story building.

Paralleling Petitioner's private plans was the on-going, and very public, comprehensive planning process for Friendship Heights. Following Council approval of the final Sector Plan in May 1974, the Council adopted the County six-year Capital Improvements Program (CIP), the Commission adopted the Sector Plan in June, and the Council comprehensively rezoned Friendship Heights in July, mostly to the CBD-1 zone. Six months after adoption of the CIP, which listed as a project the proposed acquisition by the County of Petitioner's Parcel One for a community recreation center, Petitioner filed this lawsuit. Citing primarily to *Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977), *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), and *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968), Petitioner sought to equate those cases with the facts at hand.[3]

The Court of Appeals correctly distinguished those cases by noting that none of those cases dealt with a sewer moratorium imposed by a non-party, autonomous governmental agency for the protection of the public health. *See, Smoke Rise, Inc. v. WSSC*, 400 F. Supp. 1369 (D. Md. 1975). Moreover, those cases generally dealt with blighting, or actual damage or destruction of im-

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[3]Petitioner also cites (Pet. 21) to *Richmond Elks Hall Ass'n. v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977), which, like the above cases, dealt with a "cloud of condemnation" and a "pattern of governmental abuse" (Pet. App. 12a) that persisted for years, in which development was impossible, income generation driven off, and then, the government changed its mind as to acquisition.

provements, which is not the case here. Also, unlike here, in each, the government had created a "cloud of condemnation" and a pattern of abuse that lasted six to twelve years, making use and development of the properties impossible, and culminating in the government changing its plans to acquire. (Pet. App. 12a-13a). None of that was present in this case. In short, Petitioner's cases are simply not in point; thus, there can be no conflict between the circuits.

Only *six months* after the County expressed an intention in its financial plan (the CIP) to acquire Petitioner's property, Petitioner commenced this suit. As shown above, Petitioner never lost the rental income it had previously been earning from Parcel One, never tried to mortgage or sell Parcel One, and never sought to develop Parcel One in accordance with the CBD-1 zone. Equally distinguishable is the fact that the County in those six months never abandoned its plans to purchase (or condemn if necessary) Parcel One. Negotiations had not even commenced between the County and Petitioner, nor had public hearings been held on the individual project acquisition as required by the County Code, nor had Petitioner even requested the County to go ahead and purchase by negotiation or condemn. (App. 1234, 1238-39).

Petitioner's argument (Pet. 21-22) that the Fourth Circuit's conclusion is inconsistent with the standard used by other circuits in comprehensive land use planning cases is baldly specious. First of all, the above-discussed cases involved actual use (or abuse) of the condemnation power in urban renewal or federal statutory settings. This circuit has certainly not "rendered a decision in conflict with the decision of another court of appeals on the same matter." Rule 19, Supreme Court Rules. More importantly, certiorari should not be granted except where there exists a real and embarrassing conflict of opinion and authority between circuits. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70 (1955). None has been so demonstrated. All the Fourth Circuit has done is apply the due process clause to the facts in this case's record and reach a conclusion not in keeping with Petitioner's desires.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1978

Certificate of Service

I HEREBY CERTIFY on this twenty-first day of April, 1978, that three copies of this brief in opposition were mailed first class postage prepaid to counsel for petitioner, Warren K. Kaplan and Roy Niedermayer, 1801 K Street, N.W., Suite 1100K, Washington, D.C. 20006.

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